IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

CHELSEA L. McGEE, Petitioner/Appellant, v. HON. GEORGE A. DUNSCOMB, Oro Valley Magistrate, Respondent, and THE STATE OF ARIZONA, Real Party in Interest/ Appellee.	2 CA-CV 2006-0169 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20062383

Honorable Nanette M. Warner, Judge

AFFIRMED

Law Offices of Williamson & Young, P.C.
By S. Jonathan Young
Tucson
Attorneys for Petitioner/Appellant

Tobin Sidles, Oro Valley Prosecutor
Oro Valley
Attorney for Real Party in Interest/
Appellee

E C K E R S T R O M, Presiding Judge.

¶1 Appellant Chelsea McGee was charged with driving under the influence of an intoxicant (DUI), a class one misdemeanor. She appeals the superior court's denial of her complaint for special action in which she challenged a magistrate's denial of her motion to suppress blood alcohol concentration (BAC) results. On appeal, McGee argues that because the arresting officer did not give her *Miranda*[1] warnings before requesting her to consent to a blood draw, her consent for that draw was invalid. We affirm.

¶2 In reviewing a superior court's denial of a complaint for special action, we defer to the court's factual findings. *GST Tucson Lightwave, Inc. v. City of Tucson*, 190 Ariz. 478, 482, 949 P.2d 971, 975 (App. 1997). On February 21, 2005, Oro Valley Police Officer Laurie Teachout followed a vehicle after it pulled on to a public street from a bar parking lot. Teachout suspected that the vehicle was associated with a fight that had been reported in that parking lot, and after observing driving behavior consistent with impairment, she stopped the vehicle. Eventually, Teachout arrested McGee, the driver of the vehicle, for DUI and driving with a BAC over .08. After reading McGee an advisory statement about Arizona's implied consent law, the officer requested that McGee submit to a blood test. McGee stated she understood her rights and consented to the test. She also signed a waiver of liability for the phlebotomist to draw her blood. Thereafter, Teachout advised McGee of

[1]*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966).

her *Miranda* rights. The phlebotomist then drew McGee's blood. At no time did McGee request to speak to an attorney.

¶3 Before her trial, McGee moved to suppress the BAC results, arguing Teachout's request for her consent to draw blood was an interrogation of McGee requiring *Miranda* warnings, and without them, the blood test results were "the tainted fruit of unlawful questioning." After conducting an evidentiary hearing, the magistrate denied the motion. McGee filed a complaint for special action in superior court, and the magistrate stayed further proceedings pending resolution of the complaint.

¶4 The state contends *Miranda* warnings were not required because McGee implicitly consented to a blood test, under circumstances indicating probable cause to believe she was impaired, by operating a motor vehicle in Arizona. It further argues that officers do not conduct an "interrogation," requiring *Miranda* warnings, when they seek consent to conduct a blood test because that request is not designed or intended to elicit testimonial evidence. The superior court agreed with both contentions, concluding *Miranda* warnings were not required in this case because they are "not required for seizure of non-testimonial physical evidence." We review the court's decision for an abuse of discretion. *See Bazzanella v. Tucson City Court*, 195 Ariz. 372, ¶ 3, 988 P.2d 157, 159 (App. 1999).

¶5 Arizona's implied consent statute provides, "A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration" if the

person is arrested for DUI "while the person was driving . . . while under the influence of intoxicating liquor or drugs." A.R.S. § 28-1321(A). The parties do not dispute that evidence obtained from blood tests pursuant to this provision is nontestimonial in nature. And the parties agree compliance with *Miranda* is unnecessary to seize nontestimonial evidence. *See South Dakota v. Neville*, 459 U.S. 553, 564 n.15, 103 S. Ct. 916, 923 n.15 (1983) ("In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood alcohol test is not an interrogation within the meaning of *Miranda*."); *see also Campbell v. Superior Court*, 106 Ariz. 542, 548, 552 n.8, 479 P.2d 685, 691, 695 n.8 (1971) (because "chemical tests of the blood, breath or urine . . . do not violate the privilege against self-incrimination," *Miranda* is inapplicable); *State v. Lee*, 184 Ariz. 230, 233, 908 P.2d 44, 47 (App. 1995) (*Miranda* warnings not required because field sobriety and Intoxilyzer tests are nontestimonial in nature); *State ex rel. Murphy v. City of Tucson*, 12 Ariz. App. 529, 531, 472 P.2d 952, 954 (1970) ("[W]hether or not the warning required by *Miranda* was given does not render the physical and chemical tests herein involved constitutionally inadmissible.").

¶6 Despite these precedents, and their obvious application in the context of McGee's contention, McGee asserts that "*Miranda* violations taint[] the consent upon which the State relied to justify [the] search," rendering the evidence inadmissible. But her circular logic founders on the lack of a *Miranda* violation in the first instance. If, as pertinent precedent unequivocally instructs, a *Miranda* warning is not required before

seeking consent for a search, the failure of officers to give such a warning cannot constitute a *Miranda* violation.

¶7 Nor do the cases cited by McGee support her novel contention. Rather, those cases apply the well-established proposition that, when *Miranda* violations do occur, the causal fruits of those violations must generally be suppressed. In *State v. Davolt*, 207 Ariz. 191, ¶¶ 31-32, 84 P.3d 456, 468 (2004), officers knowingly persisted in interrogating the defendant after he had twice asserted his right to counsel and his right to silence. Notwithstanding those *Miranda* violations, which our supreme court characterized as part of a chain of "extreme" police misconduct, the court separately analyzed whether the police misconduct independently rendered the subsequent consent involuntary. *Id.* ¶¶ 29-34; *see also State v. Britain*, 156 Ariz. 384, 386, 752 P.2d 37, 39 (App. 1988) (consent secured as fruit of illegal interrogation suppressed); *State v. King*, 140 Ariz. 602, 604, 684 P.2d 174, 176 (App. 1984) (same).

¶8 These cases are readily distinguishable from the scenario here because Teachout did not ask McGee any questions designed to elicit an incriminating response in advance of giving the *Miranda* warnings. And, once Teachout gave the warnings, McGee neither invoked her right to counsel nor her right to remain silent. As discussed, McGee's timing in giving the warnings was not unlawful because a *Miranda* warning is not required to seek consent for a blood test. In short, we can find no basis in the record for concluding that a *Miranda* violation tainted McGee's consent because no *Miranda* violation occurred.

¶9 For the foregoing reasons, we affirm the superior court's denial of special action relief.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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PHILIP G. ESPINOSA, Judge